FILE COPY

FILED
FEB 10 1958
JAMES R. BROWNING, Clerk

No. 693

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

BERCUT-VANDERVOORT & CO., INC., *Petitioner*

v.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

JOHN R. BENNEY,
Attorney for Petitioner,
3020 New Mexico Ave., N.W.,
Washington 16, D. C.

FRANK L. LAWRENCE,
Of Counsel,
351 California Street,
San Francisco 4, Calif.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statutes and Trade Agreement involved	2
Statement	3
Reasons for granting the writ	6
The statute	8
The trade agreement	12
Conclusion	19
Appendix A	1a
Appendix B	12a

CITATIONS

Cases:

Altman v. *United States*, 224 U. S. 583	8
Bethlehem Motors v. *Flynt*, 256 U. S. 421	12
Minnesota v. *Barber*, 136 U. S. 313	12
Vernon Distributing Co. v. *United States*, 39 C.C.P.A. (Customs) 205	12

Statutes:

Internal Revenue Code of 1939, as amended:	
Section 2800(a)(1), 26 U.S.C. (1946 ed., Supp. V) 2800(a)(1)	2, 3, 6, 8, 12, 13, 16, 17
Section 2800(a)(5), 26 U.S.C. (1946 ed., Supp. V) 2800(a)(5)	9
Internal Revenue Code of 1954:	
Section 5001, 26 U.S.C. (1952 ed.) 5001	2
Section 5025(b), 26 U.S.C. (1952 ed.) 5025(b)	9
Sections 5171 to 5252	9
Revenue Act of 1951, Section 615, 65 Stat. 569	3
United States Code:	
Title 19, Sections 460, 467, 1311	9

TRADE AGREEMENTS: Page

General Agreement on Tariffs and Trade, 61 Stat. (Pt. V) A1249; id. (Pt. VI) A14-A15, A18, A2051; 62 Stat. (Pt. III) 3680 ..... 13a, 2, 3
Article II 13a, 4, 14
Article III 13a, 3, 5, 6, 7, 8, 13, 14, 15, 16, 17, 18
Protocol to 4
Schedule XX, Part I 14a, 5

MISCELLANEOUS:

Code of Federal Regulations, Vol. 26 (1940 Supp.), sections 186.148 and 186.149 3
Funk & Wagnalls New Standard Dictionary (1921 and 1947 eds.) 14
United States Tariff Commission Report No. 160, Vol. 55 (1949) 13
Websters New International Dictionary (1937 and 1947 eds.) 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No.

BERCUT-VANDERVOORT & CO., INC., *Petitioner*

v.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

John R. Benney, on behalf of Bercut-Vandervoort & Co., Inc., prays that a writ of certiorari issue to review the judgment entered in this case on November 14, 1958, by the United States Court of Customs and Patent Appeals.

OPINION BELOW

The opinion of the United States Court of Customs and Patent Appeals (Appendix A, *infra*, p. 1a) is not yet reported.

JURISDICTION

The judgment of the United States Court of Customs and Patent Appeals was entered on November 14, 1958 (Appendix A, *infra*, p. 11a). The jurisdiction of this Court is invoked under 28 U.S.C. 1256.

QUESTIONS PRESENTED

1. Whether section 2800(a)(1) of the Internal Revenue Code of 1939, as amended,[1] imposed an internal revenue tax on imported underproof gin in excess of the tax which it imposed in respect of the like domestic product, in violation of Article III, as amended, of the General Agreement on Tariffs and Trade.

2. Whether the Collector of Customs at the port of San Francisco should have assessed the tax on the imported gin on the proof-gallon basis or in a manner that would result in a tax not in excess of the tax imposed on the like domestic product on the proof-gallon basis.

STATUTES AND TRADE AGREEMENT INVOLVED

The pertinent provisions of the Internal Revenue Code of 1939, as amended (26 U.S.C. (1946 ed., Supp. V) 2800(a)(1)), of the Revenue Act of 1951 (65 Stat. 569), and of the General Agreement on Tariffs and Trade, as amended (61 Stat. (Pt. V) A1249; id. (Pt. VI) A14-A15, A18; 62 Stat. (Pt. III) 3680), are set forth in Appendix B, *infra*, p. 12a.

[1] Section 2800 of the Internal Revenue Code of 1939, as amended, was superseded by section 5001 of the Internal Revenue Code of 1954, 26 U.S.C. (1952 ed., Supp. IV) 5001, which contains substantially the same language.

STATEMENT

In August 1952, petitioner imported into the United States from Holland through the port of San Francisco certain 90 proof "London dry gin" (R. 8, 193). The Collector of Customs at that port assessed an internal revenue tax on the imported gin on the basis of each wine gallon thereof at the rate of $10.50 per wine gallon under section 2800(a)(1) of the Internal Revenue Code of 1939, as amended (R. 7). Petitioner filed a timely protest against the assessment claiming that the tax had been improperly applied in that it exceeded in amount the tax imposed on the date of the General Agreement on Tariffs and Trade or on the date of the importation in respect of the like domestic product or in respect of an article from which the imported product had been manufactured or produced in whole or in part. The protest further claimed that the internal revenue tax should have been assessed on the basis of each proof gallon rather than on the basis of each wine gallon thereof. (R. 5-6.) Upon consideration of the protest, the Collector of Customs confirmed his assessment (R. 7) and the case was referred to the United States Customs Court in accordance with law (R. 8).

On January 1, 1948 when the General Agreement on Tariffs and Trade went into effect, section 2800(a)(1) of the Internal Revenue Code of 1939 laid a tax of $9 on each proof gallon, or wine gallon when below proof,[2] of distilled spirits produced in or imported

[2] A wine gallon is defined as a standard United States gallon containing 231 cubic inches. See section 186.148 of 26 C.F.R., 1940 Supp. A proof gallon is defined as a wine gallon containing 50 percent alcohol by volume and 50 percent water. See section 186.149 of 26 C.F.R., 1940 Supp. Therefore, a "proof gallon,"

into the United States. By the Revenue Act of 1951 (65 Stat. 569, Appendix B, *infra*, pp. 12a-13a; Congress amended section 2800(a)(1) of the Internal Revenue Code of 1939, raising the tax imposed by that section on distilled spirits from $9 to $10.50 per gallon, but provided in section 615 thereof that no amendment made by that Act should apply where its application would be contrary to any treaty obligation of the United States.

On the date of the instant importation Article II of the General Agreement on Tariffs and Trade (Appendix B, *infra*, p. 13a) provided that the products described in Part I of the Schedule relating to any contracting party imported from the territory of another contracting party should be exempt from ordinary duties and all other duties and charges in excess of those imposed on the date of that Trade Agreement, but permitted the importing country to impose, consistently with Article III, an internal tax equivalent to the internal tax imposed on the like domestic article or in respect of an article from which the imported product was manufactured or produced in whole or in part. Article III of the said Trade Agreement, (Appendix B, *infra*, p. 13a), which was tied into Article II thereof, provided that the imported product should not be subject directly or indirectly to internal taxes in excess of those applied directly or indirectly to like

---

which is also known as "100 proof," or as "proof," is 231 cubic inches of an equal mixture of alcohol and water. Thus, if the tax on the 90-proof gin involved here had been assessed on the basis of the proof gallon, the tax due would have been 90 percent of $10.50, or $9.45 for each wine gallon, instead of $10.50 as assessed by the Collector of Customs. The amount of the tax would necessarily change with each variation in the degree of the alcoholic content of the underproof gin being considered.

domestic products. Gin was described in Part I of Schedule XX, which applied to the United States. See Appendix B, *infra*, p. 14a. The protocol under which the United States acceded provisionally to the General Agreement on Tariffs and Trade provided that the provisions of Part II of the said Trade Agreement, which includes Article III thereof, should be enforced consistently with existing legislation. See 61 Stat. (Pt. 6) A2051.

The evidence adduced at the trial of this case in the United States Customs Court shows as follows: The imported gin and gin produced in the United States and sold in an underproof condition are alike in use, flavor, odor, and color (R. 39, 46-48, 55, 57). Domestic gin is distilled from neutral spirits of 190 or more proof together with botanicals, such as juniper, etc. (R. 67-69, 80, 98-99, 112). Domestic gin is always above 100 proof immediately after the distillation, and it is always withdrawn from bond and the tax paid on it while it is in the overproof condition (R. 79, 101, 103). The tax on the domestic gin is always assessed on the basis of the proof gallon (R. 78-79, 101). After the tax is paid on the domestic gin, it is reduced to below 100 proof by the addition of distilled water, and it is then packaged and placed on the market without further taxation (R. 68-72, 98-101, 115). If the domestic gin should happen to be inadvertently reduced to an underproof condition during its manufacture and should thereafter be withdrawn from bond in that condition, the tax would be assessed on it on the wine-gallon basis. But it is never consciously so made or so withdrawn from bond, and if it happens to be completed and withdrawn from bond in an underproof condition, it is wholly the re-

suit of a grievious error on the part of an employee. (R. 84, 101, 102, 114, 115, 116.)

The imported gin here involved was also made by redistilling neutral spirits of 190 or more proof together with botanicals and was about 178 proof immediately after it was redistilled. It was later reduced to 90 proof by the addition of water and was then bottled and exported to this country in the same underproof condition. Exhibits 8-A, 9-A, 9-B, R. 106-107.

The United States Customs Court, one judge dissenting, overruled the protest on the ground that section 2800(a)(1) of the Internal Revenue Code of 1939, as amended, did not discriminate between imported and domestic distilled spirits (R. 168-192). On appeal, the court below affirmed, holding that section 2800(a)(1) applied uniformly and fairly to both imported and domestic distilled spirits; that the tax imposed on the domestic overproof gin was imposed directly on overproof distilled spirits and not indirectly on underproof gin; and that although domestic underproof gin was the like domestic product to be compared with the imported underproof gin, the tax imposed on the domestic product was not imposed directly or indirectly on the domestic underproof gin within the meaning of Article III of the General Agreement on Tariffs and Trade, and therefore not in contravention of that Article.

REASONS FOR GRANTING THE WRIT

The court below has improperly decided a highly important federal question concerning the correct construction and application of the international obliga-

tion of the United States contained in Article III of the General Agreement on Tariffs and Trade (Appendix B, *infra*, p. 13a), a provision specifically designed to cover national treatment of imports and to eliminate national discrimination in connection with the imposition of internal taxes on imported articles, a question which has not been but should be settled by this Court. The question decided by the court below looms large in its importance not only because the international obligation involved runs to the many nations who are parties to the General Agreement on Tariffs and Trade in which it appears,[3] but because the decision has the effect of diluting the international obligation of its force to the extent of rendering it largely nugatory. In addition, the decision has the effect of condoning artful evasion of an international obligation designed to eliminate discriminatory national practices which have for their purpose the protection of domestic industry by imposing higher internal taxes on imports than are imposed on like domestic products. And the error in the decision is rendered significant by the fact that discriminatory internal taxes such as are involved here, which the construction placed by the court below on the Trade Agreement upholds, are expressly condemned by the very language of the international obligation itself (See Paragraph 1 of Article III of the General Agreement on Tariffs and Trade, Appendix B, *infra*, p. 13a).

---

[3] Judge Donlon, the dissenting judge in the United States Customs Court, stated it to be a well-known fact that many thousands of cases bearing on the issue presented here are pending in that court (R. 191-192).

The opinion of the court below is erroneously based upon the primary foundation that the application of section 2800(a)(1) of the Internal Revenue Code of 1939, as amended, did not discriminate against the imported product and in favor of the like domestic product within the meaning of Article III of the General Trade Agreement.[4] The opinion ignores both the realities that permeate the application of the statute and the language contained in the specific provision placed in the General Trade Agreement to cover national treatment of imported products and to assure that such imported products may enter national commerce bearing no heavier internal tax burdens than are borne by the like domestic products.

1. *The Statute.* Section 2800(a)(1) of the Internal Revenue Code of 1939, as amended, the substance of which is continued in the Internal Revenue Code of 1954 (See footnote 1, *supra*, p. 2), imposed a tax on each proof gallon, or wine gallon when below proof, of distilled spirits produced in or imported into the United States, the tax to be paid when the distilled

[4] The court below assumed that section 615 of the Revenue Act of 1951 (Appendix A, *infra*, p. 5a), which provided that no amendment made by that Act should apply where its application would be contrary to a treaty obligation of the United States, One of the amendments made by that Act was the amendment of section 2800(a)(1) raising the tax from $9 to $10.50 per gallon. It has long been held that the term "treaty" where used in an act of Congress includes a trade agreement, unless otherwise indicated by Congress. See *Altman v. United States*, 224 U.S. 583. It is clear, therefore, that Article III of the Trade Agreement is applicable to section 2800(a)(1), as amended, and that the Trade Agreement controls where the tax imposed is contrary to its provisions.

spirits should be withdrawn from bond.[5] As applied, the statute permits the domestic producers to withdraw their gin from bond while it is yet in an overproof condition, pay the tax on the proof-gallon basis and later reduce the alcoholic content to below proof by the addition of water and then market the underproof product without further taxation.[6] The bald result is that domestic underproof gin when it is sold in commerce has not borne a tax that has been computed on the wine-gallon basis for it would be unreasonable to assume that a domestic producer of gin would of his own accord withdraw his gin from bond in an underproof condition and pay a higher tax on it than he would otherwise be required to pay. In fact, there is ample evidence in the record to show that dometsic gin is never withdrawn from bond in an underproof condition unless it is the result of a grievous error on the part of an employee (R. 84, 101;

---

[5] The court below conceded that the classifications in the statute were established long ago for purely domestic purposes (Appendix A, *infra*, p. 5a). It is equally clear that the provision in the statute for the payment of the tax at the time the distilled spirits are withdrawn from bond is a provision more appropriately designed to fit into the bonded-distillery system established by law for the better control of collecting taxes on the products of domestic distillers (See sections 5171 to 5252, Internal Revenue Code of 1954, 26 U.S.C. (1952 ed.) 5171 to 5252) than it is to fit into the quite different system established for controlling the collection of tariff duties on imports, under which latter system the internal revenue taxes on imports are collected (see for example, 19 U.S. Code 460, 467, 1311).

[6] There is no rectification tax on gin produced by the redistillation of a pure spirit over juniper berries and other aromatics. See section 2800(a)(5) of the Internal Revenue Code of 1939 (26 U.S.C. (1946 ed.) 2800(a)(3)). See also section 5025(b) of the Internal Revenue Code of 1954 (26 U.S.C. (1952 ed.) 5025(b)) to the same effect.

102, 114, 115, 116). Hence, the stark reality of the situation is that domestic underproof gin never bears a tax that has been computed on the wine-gallon basis. On the other hand, section 2800(a)(1) affords imported underproof gin no such painless method of avoiding the higher tax. When imported gin arrives in the United States in the same underproof and packaged condition in which like domestic gin enters the national commerce, the imported gin is required by the statute, as applied, to pay a tax computed on each wine gallon thereof. Patently, it is impossible for an importer of underpoof gin to have his underproof importation taxed on the lower proof-gallon basis which the domestic underproof product in reality enjoys when it goes on the national market in competition with the import.

The blunt conclusions of the court below to the effect that section 2800(a)(1) affords an importer the same opportunity to obtain the lower proof-gallon tax as it affords the domestic producer (Appendix A, *infra*, p. 8a), and that the statute is applied equally and fairly to both domestic and imported distilled spirits alike, is but slavish adherence to the bare form of the statute, a statute so artfully drawn as to permit domestic evasion of a material part of it and still comply with its bare form. It is obvious that the domestic producer may, and universally does, at will manufacture and market underproof gin without paying a tax on the wine-gallon basis. It is equally obvious that an importer may not import underproof gin without paying the tax on the wine-gallon basis. He must, if he is to obtain a proof-gallon assessment, import proof or overproof distilled spirits, either neutral or in the form of overproof gin. Since underproof and over-

proof distilled spirits, as the court below holds, are distinct and different articles, it is clear that the importer is faced with crippling restrictions. He must import a product distinct and different from the article he desires to place on the market, a product distinct and different from the domestic product which is in competition with the product that he contemplates marketing. And he must, of course, import in bulk, for it would scarcely be economically feasible for him to purchase gin abroad already packaged in a proof or overproof condition and after importation restore it to bulk, subject it to the completing process, and then repackage the completed product for the United States market. It will be readily observed that in such costly and delaying procedures, deviations, and manipulations lies the only road open to him under the statute to obtain a proof-gallon assessment on his imported product and a tax no higher than the competing domestic product has borne when it enters the market. This cannot reasonably be said to be tax equality, for he can achieve the result only through substantial losses in dollars and time with which he would not be burdened if he had equality of opportunity.

There may also be other sacrifices between the importer and tax equality with the like domestic product. Imported merchandise may well be, and often is, such that the foreign producer of it has gained great prestige from his expertise and good will, so that products made and completed by him in his own plant abroad and bearing his name and indicia to the effect that it was produced and packaged by him in his own foreign plant will command a far greater market respect and financial return than will merchandise that has become

commonplace because it bears no praiseworthy name and because it has been manipulated by strangers after importation. Thus, it is beyond cavil that an importer, in order to obtain the tax advantage which the domestic product freely and universally enjoys, must indulge in impractical merchandise manipulations and substitutions, face substantial economical hindrances and losses, and indulge odious delays. Even then, his tax equality is but simulated, for he cannot import the product which he desires to place in the United States market and at the same time obtain a proof-gallon assessment of the tax.

We respectfully submit that if this statute does not discriminate against imported underproof gin and in favor of domestic underproof gin, it would be difficult to enact one that would have that result. Cf. *Minnesota* v. *Barber*, 136 U.S. 313, 323 and *Bethlehem Motors* v. *Flynt*, 256 U.S. 421.

2. *The Trade Agreement.* After holding that section 2800(a)(1) of the Internal Revenue Code of 1939, as amended, had not been applied in a discriminatory manner to the imported underproof gin, the court below further held that the General Agreement on Tariffs and Trade involved here, which contains in Article III thereof an international obligation entitled the "National Treatment" provision,[7] is not different in substance with respect to national discrimination against imports from prior trade agreements which did not contain that provision, and that its previous decision in *Vernon Distributing Co.* v. *United States*, 39 C.C.P.A. (Customs) 205, construing

[7] This provision does not appear to have been placed in any prior trade agreement to which the United States was a party.

one of the prior trade agreements as not having been violated by the application of section 2800(a)(1), was controlling of the instant case. This holding with respect to Article III of the General Trade Agreement, we respectfully submit, strikes down an important international obligation of the United States and deprives it of its vitality. Article III of the General Trade Agreement, which the court below has all but obliterated, is a provision designed to prevent and eliminate the use of discriminatory internal taxes imposed on imports for the purpose of providing protection to national industries.[*] The postulate of that provision is that such discriminatory internal taxes may not be used even indirectly to afford protection to domestic industry, yet the court below has held that the use of the word "indirectly" in Article III does not make the Trade Agreement different in substance from prior trade agreements which did not contain the language of Article III or contain the word "indirectly" in any such context. This holding is wrong on its face, for it cannot be reasonably be said that a new provision in a trade agreement, obviously designed to achieve a result not theretofore attained by any trade agreement, means nothing and accomplishes

[*] The United States Tariff Commission, which is in close relation with trade agreement negotiations, in analyzing Article III of the General Trade Agreement, pointed out that the provisions for national treatment in the General Trade Agreement are broader than similar provisions in previous trade agreements and that:

> "* * * they include a commitment against the use of taxes not only on imported articles which are 'like' domestic articles but also on those which are not 'like' domestic articles but are directly competitive with or 'substitutable' for domestic products which are not similarly taxed."

See United States Tariff Commission Report 160, vol. 55 (1949).

nothing. Article III is uncontrovertibly an important international obligation of the United States and the decision of the court below plainly leaves it but an empty shell, for if the word "indirectly" contained therein means nothing, then artful methods for evading the obligation may be applied by any participating nation without fear of being called to task. The decision of the court below construing Article III, the said National Treatment provision of the General Trade Agreement presents, therefore, an important federal question which has not been but should be reviewed and settled by this Court.

It is clear that the decision of the court below construing Article III is erroneous. Article II of the General Trade Agreement provides that imports shall be exempt from all ordinary duties and all other charges of any kind in excess of those imposed on the date of the said Trade Agreement, but permits the importing country to impose on imports a charge equivalent[9] to an internal tax imposed consistently with Paragraph 2[10] of Article III in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part. Paragraph 2 of Article III, as amended,

[9] The term "equivalent" as used in Article II plainly means equal in value or amount. This comports with the definition of the word "equivalent" appearing in the dictionaries. See Funk and Wagnall's New Standard Dictionary (1921 and 1947 eds.); Webster's New International Dictionary (1937 and 1947 eds.).

[10] The language now appearing in Paragraph 2 of Article III was originally contained in Paragraph 1 of that Article. The amendment of Article III inserted new material as Paragraph 1 and renumbered the old Paragraph 1 as Paragraph 2. See 62 Stat. (Pt. 3) 3680.

provides that imported articles shall be exempt from internal taxes in excess of those imposed directly or indirectly on like domestic products. See Appendix B, *infra*, p. 14a.

The court below after recognizing that the imported underproof gin had been taxed on the basis of each wine gallon thereof (Appendix A, *infra*, p. 1a), conceded that it is the universal practice of domestic producers to withdraw their gin from bond while it is in an overproof condition and pay the tax on it on the proof-gallon basis before reducing its alcoholic content to below proof for marketing purposes (Appendix A, *infra*, p. 4a). It also assumed that the domestic underproof gin, which is in commercial competition with the imported underproof gin, is the "like domestic product" within the meaning of that term as used in Article III of the General Trade Agreement (Appendix A, *infra*, p. 14a). Despite these concessions, the court below concluded that the tax assessed on the imported underproof gin was not in excess of the tax imposed in respect of the like domestic product, *i.e.*, domestic underproof gin (Appendix A, *infra*, p. 7a):

This conclusion of the court below is based on the premise that proof and underproof distilled spirits are separate and distinct commodities. From this premise the court below went on to hold that the internal revenue tax paid on the domestic overproof gin on the proof-gallon basis is actually paid directly on overproof distilled spirits, a product separate and distinct from underproof gin. Hence, said the court, the tax paid on the domestic overproof distilled spirits is not paid indirectly on the domestic underproof gin, *i.e.*,

the like domestic product in this case, but is merely reflected in its price. This holding necessarily infers that the statute imposes no tax at all, directly or indirectly on domestic underproof gin derived from overproof gin, within the meaning of Article III of the General Trade Agreement. It is, of course, impossible to reconcile this holding and the holding that there was no violation of the Trade Agreement with the lower court's assumption that domestic underproof gin is the "like domestic product" within the meaning of Article III, for if it is the like domestic product and there was no tax imposed on it either directly or indirectly, Article III would exempt the instant import from the entire tax, or at least from the entire increase in the tax provided for by the 1951 amendment of section 2800(a)(1). Hence, even under the court's own considerations, its conclusion was wrong on its face, for if there was no tax at all on the like domestic product, the tax imposed on the instant imported underproof gin was clearly in excess of the tax imposed on the like domestic product, because the like domestic product bore no tax at all. Consequently, if the lower court's premises are sound, there was a plain violation of Article III when the tax was assessed on the instant importation.

Whether or not the premises on which the court below based its erroneous conclusion were sound, it is, we believe, reasonable to assume that the negotiators of the Trade Agreement contemplated that the import should pay no more tax than the like domestic product actually bears, through taxation of the product from which it is immediately derived, at the time it enters the market in competition with the corresponding imported product. A logical conclusion is that the nego-

tiators placed the word "indirectly" in Article III to cover just such a situation as is here presented, namely, a situation where a competing domestic article, not directly taxed, is permitted to enter the competitive market bearing only the weight of a tax that was imposed directly on the product from which it was immediately derived and where the corresponding imported article is required to pay a higher tax based on its condition and state of readiness for the market at the time of its importation.

We believe that harmony with the stated purpose of Article III of the General Trade Agreement requires that Article III be construed as contemplating that the internal revenue tax universally assessed on domestic overproof gin on the proof-gallon basis under section 2800(a)(1) is imposed *indirectly* on the like domestic product, namely, the domestic underproof gin that enters the national commerce in competion with imported underproof gin. This construction is plainly consonant with and will effectuate the purpose of Article III, stated by the negotiators in Paragraph 1 of that Article to be the prevention and elimination of discriminatory internal taxes which protect domestic industry, for it would cause the import to bear the same amount of internal tax as the like domestic product, in reality, bears when it is offered in competition with the import in the national commerce. We as well believe that it would be unreasonable to assume that the negotiators of the General Trade Agreement contemplated that imported products would have to be imported in an uncompleted condition or in the form of a separate and different article from that which is to be marketed, or that the importer thereof would have to face substantial and unusual economic

hazards and merchandise prestige sacrifices before his imported product would be entitled to have equal internal tax treatment with the like domestic product.

The decision of the court below necessarily has the effect of fostering artful evasion of a provision of the Trade Agreement the purpose of which is declared by the negotiators to be the prevention and elimination of discriminatory internal taxes that are imposed upon imports in a manner that affords protection to domestic industry. The decision likewise connotes that the negotiators labored long and brought forth nothing, and it seems to attribute to them a degree of carelessness that strikes a hard blow at the useful and serious purpose of international negotiation in the commercial field. In addition, the decision below is completely at war with the undeniable fact that the internal revenue tax assessed on the imported underproof gin in this case is in truth and reality in excess of the tax actually borne by the like domestic product. We respectfully submit, therefore, that the tax assessed on the instant import was in excess of that imposed indirectly on the like domestic product, namely, underproof gin, within the meaning of Article III of the General Trade Agreement. Hence, if Article III means anything, and it cannot reasonably be assumed to be an idle gesture, the assessment on the import in this case was in violation of it, and was plainly unauthorized. Unquestionably then, the court below erred and in so doing decided an important federal question in a manner that warrants review by this Court.

CONCLUSION

For the above reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

JOHN R. BENNEY,
Attorney for Petitioner.

FRANK L. LAWRENCE,
Of Counsel.

February 1959.